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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MARGARET PICUS, an individual; on behalf of herself, and on behalf of all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC; MENU FOODS INC.; DEL MONTE CORPORATION; SUNSHINE MILLS, INC.; CHEMNUTRA INC.; and DOES 1 through 100, Inclusive, Defendants.	Case No. 2:07-CV-00682- PMP-LRL **REPLY TO DEFENDANT MENU FOODS' RESPONSE TO PLAINTIFF'S OBJECTION TO EXHIBIT "A"** JUDGE: Hon. Philip M. Pro

Plaintiff Margaret Picus hereby replies to the Response by Defendant Menu Foods to Plaintiff's Objection to Exhibit "A" in connection with the motion to dismiss under Rule 12 as follows:

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I. INTRODUCTION

Defendant's argument that a corporate press release must be accepted for the truth of the matter asserted therein is specious, sanctionable and merits no reply.[1] This argument turns hearsay and the rules of evidence upside down. If the Defendant's argument were true, a corporate defendant could merely issue a press release as a complete defense to any case. Fortunately, the law is otherwise.

A press release, such as the one in Exhibit "A", is a document that is manufactured and created by the Defendant. This document was not drafted by the Plaintiff. Therefore, the only allowable evidentiary use of such an inadmissible document is where the document drafted by the Defendant contains statements against the Defendant's interest.

Plaintiff's complaint referred to a single statement made in the course of the recall by Defendant ChemNutra which admitted that a central manufactured component of the Ol'Roy product was imported from China. This in an admission against interest which is a limited exception to the hearsay rules. Fed. Evid. Code § 804(b)(3). This admission is compelling evidence that the Ol'Roy products does not meet the standard for the designation of "Made in the USA" under state and federal law, because in order to be designated as "Made in the USA" the product must be "all or virtually all" made in the United States:

> A product that is all or virtually all made in the United States will ordinarily be one in which **all significant parts and processing that go into the product are of U.S. origin.** In other words, where a product is labeled or otherwise advertised with an unqualified "Made in USA" claim, it should contain only a de minimis, or negligible, amount of foreign content.

62 Fed. Reg. 63756, 63768 (1997) (emphasis added).

II. THE DEFENDANT'S USE OF THE RECALL NOTICE AS EVIDENCE OF THE TRUTH OF THE MATTER ASSERTED IN THE PRESS RELEASE IS PLAIN HEARSAY

The "recall notice" now offered as evidence that the Defendant should be dismissed as a matter of law is pure hearsay. Fed. R. Evid. § 801 and § 802. Defendants' arguments concerning the reference to contracts or instruments in a pleading does not provide an exception to the rules of

[1] In complete ignorance of the rules of evidence and the right to trial, Defendant actually argues that the Defendant's own press release is evidence which "disproves the claim that the subject pet food was not "Made in the USA."

evidence. Moreover, the Menu Food's "recall notice" is not even referenced in Plaintiff's complaint, and Defendant concedes this point (Def's Response at 4:16-18). Rather, Plaintiff referred to an admission made by Defendant Chemnutra in the course of the recall. Thus, the statements in the Menu Food's "recall notice" which Defendant uses from in Exhibit "A" are (1) not admissions and therefore hearsay, (2) not referenced or central to Plaintiff's claim[2], and (3) are wholly without evidentiary support.

III. THE DEFENDANT CONCEDES THAT THE RECALL NOTICE IS NOT RELEVANT TO THE CLASS PERIOD IN THIS CASE

Defendant concedes that the statements in the "recall notice" pertain only to a certain contaminated batch of Ol'Roy pet food products, and did not offer refunds to all purchasers of Ol'Roy pet food products in the four years preceding the filing of this complaint. Plaintiff's complaint seeks monetary recovery for all purchasers of Ol'Roy pet food products designated as "Made in the USA" during the period of April 30, 2003 through March 16, 2007. The Menu Foods "recall notice" addresses only a six month period out of the four year class period at issue in this case. As such, the recall notice has no relevance to the years preceding the recall and does not provide admissible evidence that Defendant has not retained the benefit from such sales.

While the Defendant has an obligation to pay refunds for tainted products, the Defendant has a separate and independent duty to pay refunds to purchasers who purchased product which had "deceptive representations or designations of geographic origin." N.R.S. § 598.0915. The two duties are not the same.[3] Defendant's attempt to use a self-serving press release addressing only a specific batch of product to dismiss consumer claims from prior years for which no refund was offered cannot be accepted.

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[2] In any event, as held by the Ninth Circuit, the "mere mention of the existence of a document is insufficient to incorporate the contents of a document by reference" United States v. Richie, 342 F.3d. 903, 908 (9^{th} Cir. 2003).

[3] Of course, consumers already provided with a refund for tainted product will not be entitled to a second refund. But consumers whose product was not tainted are nevertheless entitled to refunds for products found by the Court to be sold in violation of N.R.S. § 598.0915.

IV. THE AUTHENTICATION OF THE PRESS RELEASE BY AN ATTORNEY FAILS TO ADDRESS THE ACCURACY AND FOUNDATION FOR THE PRESS RELEASE

The attorney affidavit, while attesting the "recall notice" is a true and correct press release does nothing to establish the accuracy and foundation for the truth of the statements contained in the press release. The attorney has no personal knowledge as to the manufacturing processes performed on the products. The attorney has no personal knowledge as to the refunds paid and the time period for which refunds were offered. The attorney has no personal knowledge as to whether the imported components of the product are "negligible" or not. Thus, all we know is that the document is a true and correct copy of Menu Food's press release, but the truth of the matters and statements asserted therein have not been authenticated, evidenced or shown to be accurate.

V. CONCLUSION

For all of these reasons, Plaintiff respectfully submits that the Court should not consider Exhibit "A" for the truth of the matter asserted therein as argued by Defendant Menu Foods. Plaintiff has a right to discovery and must be allowed discovery to rebut and respond to contested evidentiary issues.

Dated: August 08 , 2007

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By: /s/ Robert B. Gerard

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